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ABSTRACT

The Sunshine Act, designed to encourage open meetings to increase public understanding of the governmental decision-making process, went into effect in March 1977. A total of 50 agencies, including the Federal Communications Commission (FCC), are subject to the provisions of the Sunshine Act. The act lists 10 exemptions, any of which can result in a closed meeting. The FCC was not unique among agencies in its early overall opposition to the Sunshine Act, but it promised to comply. The FCC's plans for implementation of the Sunshine Act met with some public skepticism, particularly regarding how easy it would be for the Commission to close a meeting to the public. During the 2 years following the FCC's initial implementation plans, the commission adopted other Sunshine-related measures that earned it, in certain quarters, the label of exemplary agency, but data obtained from the FCC indicated that only a small percentage of meetings were open to the public for each year through 1980. During 1978-79, the exemption dealing with the agency's involvement in civil actions or proceedings was used one and one-half times more frequently than all other exemptions combined. The Act also still permits Ex Parte communication--policy by oral or written communication. With current budget cuts precluding advanced notice of FCC meetings by mail, the public must wait until the item appears in the "Federal Register," often on the very day of the meeting, to find out about it. (HTH)

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FREEDOM OF INFORMATION CENTER REPORT NO. 459

FCC AND THE SUNSHINE ACT

This report was written by Kenneth Weiss, M.A., a graduate of the University of Missouri School of Journalism.

After years of debate, compromise and refinement, the federal Government in the Sunshine Act finally was signed into law by President Ford on Sept. 13, 1976. Public Law No. 94-409 went into effect March 12, 1977.

First introduced by Florida Sen. Lawton Chiles in 1972 as S.B. 3881, the legislation underwent a number of revisions until it was passed unanimously by the Senate as S.B. 5 on Nov. 6, 1975.

An identical bill was introduced in the House by Florida Rep. Dante Fascell on Sept. 25, 1975, as H.R. 9868.

Sen. Chiles spoke eloquently on his primary reason for introducing the legislation: "All of use know of the feelings of alienation and frustration so many people feel toward government these days. As government has grown, it seems to have gotten further away, out of reach of people. It is not responsive enough; there is too little communication and too little understanding and too little trust between them."[1]

Susan Stephenson expanded on this government/populace theme as it pertained to the Sunshine Act. She viewed the act as meeting two objectives: increasing public understanding of the decision-making process and promoting public confidence in the government.[2]

While the act was designed for public observation, it wasn't meant to invite direct public participation. Still, it was the hope of many supporters of the act that observation was the first step toward more active public participation.

David Cohen, then of Common Cause, called openness an "equalizer" in a law symposium address in 1979. By allowing citizens to know what is going on in government, Cohen said, "it allows public interest priorities to compete with special interest priorities."[3]

A total of 50 agencies, including the Federal Communications Commission, fall under the Sunshine Act.

The act lists 10 exemptions, any one of which can result in a closed meeting. The exemptions range from national defense considerations to trade secrets to privacy and personnel matters to adjudication proceedings.

The exemptions of most salience to the FCC are internal personnel matters, investigatory records, premature disclosure and, especially, adjudicatory matters.

The Federal Communications Commission was not unique among agencies in its early overall opposition to the Sunshine Act.

Jerry Markham cited a number of often-heard criticisms of the open meetings and government candor concepts:

— "Government doesn't work that way."
— "What if we all happen to be on the same airplane?"
— "Can't we have a drink together?"
— "Members will just play to the public and the press."[5]

FCC commissioners James Quello and Robert E. Lee went on record as fearing sunshine would restrain debate by inhibiting the interactions of participants.[6]

But sunshine became a reality and, although the FCC displeased Sen. Chiles by closing its very first meeting after the act took effect, the commission's chairman promised full compliance.

"We're going to be complying with the letter and the spirit of the law," Richard E. Wiley said.[7]

The FCC Begins Implementation

In a series of reports listed in the **Federal Register**, the commission spelled out its plans to implement the Sunshine Act. In its first notice on March 3, 1977, the FCC amended certain procedural rules concerning the filing of tariffs.

Although the Sunshine Act was designed to facilitate public participation, **Federal Register** items were often difficult to follow without a scorecard. For example, the March 3 item noted that the Government in the Sunshine Act contains requirements that will have an "indirect impact upon our internal processes."[8]

On March 7, 1977, the FCC enunciated the bulk of its implementation plans for the Sunshine Act. The report acknowledged the comments of public interest groups critical of the FCC's proposals to follow the statute almost to the letter.

Howard University's School of Communications wanted clarification of what constituted "disruptive" behavior, an action that could get one expelled from an open meeting.

The National Black Media Coalition took exception to the definitions of "agency" and "meeting."

The report spelled out the exemptions and the FCC's procedure for closing a meeting. One commissioner could request a vote to close. A majority vote would close a meeting. Non-exempt portions of a closed meeting would be available by transcript or electronic record for at least two years.

Summary

This paper reviews the Government in the Sunshine Act, how the Federal Communications Commission has complied with the act and how it may be dealt with in the future by the FCC.

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The National Citizens Committee for Broadcasting, a public interest organization, acknowledged that the FCC helped allay initial concerns of public interest groups over the commission's "scanty proposed regulations" by responding to these concerns in its report. The NCCB noted that the FCC announced it would make public the names of commissioners who voted to close a meeting.

Perhaps ominously, the NCCB also mentioned that "action by circulation" and "action by notation" would not fall within the definition of "meeting" for purposes of the act. Circulation is business that takes place between regular meetings, and notation is a system by which commissioners simply initial a piece of paper discussing a matter that requires action. Both practices are seen by critics as ways of circumventing the Sunshine Act, and the practices still continue. But more on that later.

The NCCB also maintained that in the week before the Sunshine Act went into effect, the FCC was "all aflutter with activity," in an effort to dispose of much pending business "before the curtain rose."[10] Between March 8 and 11, the commission issued regulations on multiple-ownership of broadcast stations, standards for renewal hearings, equal employment processing criteria and network radio rules — all substantive issues.

High Marks for FCC at First

Implementation of the Sunshine Act didn't reach completion overnight. During the two years following the FCC's initial implementation plans, the commission adopted other sunshine-related measures that earned it, in certain quarters, the label of being an exemplary agency.

In 1978 and 1979, the commission's Consumer Assistance Office ran a series of workshops to teach members of the public how to participate in FCC rulemaking proceedings.

These workshops seem to have exceeded the dictates of the Sunshine Act. After all, the purpose of the act was simply to allow for "observation" of government processes.

The major function of the office was to disseminate FCC information to the public. The office designed special editions of **Actions Alert**, which listed current docket cases and petitions for rulemaking of interest to citizen groups. While some groups said these special editions didn't explain the issues clearly enough, the effort generally was praised.[12]

The CAO also conducted a six-week course for FCC employees on how to communicate with the public and helped coordinate a conference on minority ownership of broadcast media.

On May 2, 1979, the FCC adopted a proposal to begin providing the public with summaries of items scheduled for discussion at open meetings. Until then, citizens attending the meetings were given an agenda that included only the titles of the items to be discussed. These "Sunshine Agenda" are issued at least seven days prior to a meeting. They contained the title and a brief summary of each open meeting item.

In a Jan. 17, 1980 **Federal Register** item, the commission tooted its own horn by citing the steps it had taken in recent years to facilitate public participation. These included issuing publications describing the FCC's procedures and highlighting significant rulemakings, conducting the public participation workshops around the country, scheduling oral arguments in important rulemakings and providing limited assistance to indigent intervenors in adjudication proceedings.[14]

Commenters who favored expanding the reimbursement program contended that it would add to a diversity of viewpoints. In opposition, ABC and other broadcasters argued that the FCC had already modified its rules to encourage broader public participation and had created the Consumer Assistance Office to aid the public. The FCC said it would "serve the public interest" to increase public participation in its rulemaking proceedings.

The reimbursement program, however, has never been implemented. Congress would have to approve the dispensing of funds for reimbursement. According to an aide to Commissioner Quello, Congress "has made clear unofficially," through the Senate and House Judiciary Committees, that it opposes FCC reimbursement of public intervenors.

Criticism Mounts

Lest the impression be given that the FCC deserves a "model" image, the above developments should be balanced by criticisms aimed at the commission in the immediate wake of the Sunshine Act.

Most prominent among the critics was Harry M. (Chip) Shooshan III, then chief counsel of the House Communications Subcommittee. Shooshan was quoted as saying the commission was ignoring the "spirit" of the law. Apparently, Shooshan was referring directly to the previously described "notation" voting system used by the FCC.[15]

Shooshan's comments followed by a year a 1976 House report that said the FCC reflected a "narrow political interest." The report, noted in the Washington **Post**, (10-10-76) asserted that the agency remains "beseiged by powerful external pressures," referring to large communications companies.[16]

This reproach was mild compared to what was contained in a Senate study directed by Sen. Abraham Ribicoff of Connecticut. The report criticized the FCC for causing proceedings to "drag on longer than they need to" by providing little guidance to applicants on how the commission chooses among them.

From a sunshine standpoint, the two-volume Senate report singled out the FCC as having a poor record in citizen participation at proceedings. Specifically, it attacked the FCC's role in the television industry's adoption of family viewing in the NAB code.[17]

The report concluded that public interest groups generally have a tiny voice in commission proceedings, while the industries dominate.

Common Cause, the public interest group, issued a study in August 1977 comparing the number of meetings industry representatives had with commissioners to public interest group meetings with the same officials. The study found that 39 commissioners from various agencies held meetings 10 times more frequently with industry representatives than with public interest groups.

FCC Commissioner Wiley held 54 percent of his meetings with industry and 11 percent with consumers, while Commissioner Quello held 60 percent with industry and 8 percent with consumers.

Not long after the Common Cause study, **U.S. News and World Report** published an article entitled "The FCC: Washington's Worst Agency?"[19] It criticized the FCC's slowness and the "cozy relationship" with commissioners enjoyed by industry lobbyists. On the sunshine-related front, the article did laud the Consumer Assistance Office and noted that it handles about 15,000 telephone queries a year.

While the direct effect of industry's lobbying is difficult to gauge (unless one cares to speculate from actual policy), it is easier to evaluate the commission's performance regarding the Sunshine Act.

What the Data Show

Data obtained from the FCC break down the number of open and closed meetings held and the exemptions used. The statistics overlap because, for some reason, the commission kept figures for both calendar and fiscal years. There is a gap in the data; the FCC couldn't locate figures for 1978.

The statistics show that the commission took up 361 open meeting items and 101 closed items in 1977 (from March 14 to Dec. 31). Thus, 78.1 percent of items were open to the public. Of the 101 exemptions invoked, the adjudicatory one was used 71 times. Next most frequent was the investigator/adjudication exemption, used 10 times. Reasons of "personnel-/privacy" were cited seven times; "premature disclosure," five; "investigatory/premature disclosure," three; and "executive order," "investigatory records," "exempt/premature disclsoure," "confidential/investigatory" and "privacy/premature disclosure" were used one time each.

It is difficult to draw yearly comparisons of FCC performance against other agencies from existing statistics. Still, a Common Cause study of the first of the act showed 39 percent of all agency meetings were closed entirely to the public in the act's first year. Only 37 percent were open entirely, while 24 percent wre partially open.[20]

Common Cause statistics for the FCC's first post-Sunshine Act year show nine mettings were open six closed and eight partially open. The percentage of open meetings, 39 percent, falls just above the agency average. "Only" 26 percent of the FCC meetings were closed, well below the average, while 35 percent were partially open.

In subsequent years, the FCC released statistics for both the number of meetings and the number individual agenda items open and closed. It becomes apparent that FCC performance looks more impressive if the agenda items are reviewed rather than the meeting data.

For calendar year 1979, 46 meetings were open and 31 closed. None were partially closed. Thus, 59.7 percent were open meetings, a marked improvement over the first year. The report notes that of a total of 755 items considered at the 77 meetings, 648, or 85.8 percent, were considered at open meetings and 107 items, or 14.2 percent, at closed meetings. For the 31 closed meetings, 15 exemptions were due to adjudication.

For fiscal 1980 (Oct. 1, 1979, to Sept. 30, 1980), 41 open meetings and 32 closed meetings were held. Thus, 56.2 percent were open. A total of 655 items were considered during the fiscal year. Of those, 550, or 84 percent, were considered at open meetings and 105 items, or 16 percent, at closed meetings. Again, the adjudication exemption was used most heavily — 75 times out of 105 exemptions.

In other sunshine-related items, the calendar year 1979 report is instructive. It shows that of the 77 meetings, 62 were called with seven days advance notice; nine got less than seven days and six were called on an emergency basis. Also, as required when a meeting is closed, transcripts were made. However, of six requests for transcript matter in 1979, only one was granted; two were partially granted and three were denied. Transcript requests are processed like other requests for inspection made under the Freedom of Information Act.

A Memo to the FCC Commissioners

Particularly instructive of the bases of which the FCC closes meetings under the Sunshine Act is a memo, dated April 1, 1980, from the general counsel and the chief of the Office of Opinions and Review. Several commissioners had requested the memo to clarify factors to consider deciding whether to close a meeting.

The memo states, "notwithstanding the exemptions, an open meeting may be held where the public interest benefit in having an open meeting outweighs the benefits of invoking an exception to close the meeting." This reinforced the act's presumption toward openness.

The memo then examines the 10 exemptions, citing specific cases in which the FCC invoked them. The first exemption, national defense and foreign policy, involves meetings dealing with properly classified national security information. When a meeting involves several topics and not all concern classified information, the FCC may close only that portion of the meetings where such topics are to be discussed, the memo states. This exemption is used "occasionally" by the FCC. For example, the commission closed the briefings by the Defense Department on certain classified matters.

The second exemption, internal agency procedures, involves personnel rules and practices of an agency. During 1979, the FCC used this exemption several times, including meetings to discuss the reorganization of bureaus and offices.

The third exemption deals with matters specifically exempted from disclosure by another law. The fourth exemption, confidential information, deals with trade secrets and commercial or financial information obtained from a person. This exemption is identical to the exemption in the FOIA. The memo states that FCC meetings are closed occasionally on the basis of this exemption.

The fifth exemption, criminal accusations, involves accusing any person of a crime or censuring any person. The FCC used this exemption when it considered the effect of alleged criminal activity by a principal of a TV licensee.

The sixth exemption, invasion of privacy, involves a clearly unwarranted invasion of personal privacy. The memo states that the agency should not close a meeting just because personal information is to be discussed. The information has to be weighed against the public interest. Also, the memo states, a House Report suggests a meeting would more likely be open for discussion if the competency of a high-ranking public official is under question rather than the actions of a low-level employee.

The seventh exemption, investigatory information, involves records compiled for law enforcement purposes. The information must be about particular individuals or corporations; general industry investigations would not be exempt. During 1979, the FCC used this exemption to discuss the issuance of amateur call signs.

The eighth exemption, reports regarding banks, deals with the regulation of financial institutions. The memo states, "Matters are not expected to arise at the commission where this exception would be used."

The ninth exemption, premature disclosure, deals with revealing information that is "likely to significantly frustrate implementation of a proposed agency action." The FCC has used this exemption to discuss such matters as World Administrative Radio Conference proposals.

The final exemption, litigation, adjudication and hearings, deals with the agency's involvement in a civil action or proceeding. A meeting may be closed to discuss any formal hearing where a decision is made of the basis of a record.

During 1978-79, this exemption wass used by the FCC 1½ times more frequently than all other exemptions combined. The memo states the commission should consider whether an open meeting would harm someone's reputation, undermine the agency's litigation strategy or impede a full and frank discussion. "If discussion of an adjudicatory or judi-

cial matter would not result in these effects, an open meeting should be considered."

Among the 1979 cases in which this exemption was invoked were the WNCN Listeners Guild format case, in which listeners of the New York City classical music station opposed a proposed format change, and the AT&T subpoena of FCC records.

In the memo's summary, the general counsel and the chief of opinions and review spelled out the questions commissioners should ask when deciding whether to close a meeting:

— "For adjudications (#10), ask: Would an open meeting harm someone's reputation, undermine the agency's litigation strategy or impede a full and frank discussion?

— For investigatory information (#7), ask: Would an open meeting cause any of the six results listed in the exemption: (a) interfere with enforcement proceedings, (b) deprive a person of a right to a fair trial or an impartial adjudication, (c) constitute an unwarranted invasion of personal privacy, (d) disclose the identity of a confidential source involved in a criminal investigation, (e) disclose investigative techniques and procedures, or (f) endanger the life or physical safety of law enforcement personnel?

— For premature disclosure (#9), ask: Would an open meeting significantly frustrate implementation of the proposed action?"

Discussion of the exemptions is a good jumping off point to get into the last part of the paper. This section is culled from discussions with FCC officials and public interest representatives. It is meant to gauge perceptions of the FCC's compliance with the Sunshine Act and to consider where sunshine matters currently stand.

Ex Parte Communication

But first, a brief discussion of a confusing sunshine-related matter — ex parte communication — is in order. No look at the Sunshine Act would be complete without mention of ex parte.

Ex parte communication is an oral or written communication, other than a formal comment, on the merits of a pending proceeding. It is addressed to a commissioner or staff member when other interested parties are not present.

According to Mark Robner, a Common Cause attorney, the courts have given contradictory opinions on the matter. In 1977, the **Home Box Office v. FCC** decision outlawed all ex parte contact. Shortly afterward, the **Action for Children's Television v. FCC** decision clouded the ex parte issue.

According to Robner, ex parte is permissible now in informal matters, except where "valuable privilege" (a lot of money) is involved. Ken Howard, a legislative aide to Commissioner Quello, says the FCC is interpreting the decision even more broadly by "allowing it in all informal proceedings." The FCC, he says, has "gotten away with it so far."

Commissioners have argued through the years that ex parte provided them with necessary background information, that it is a valuable part of the decision-making process. Public interest groups, such as the Media Access Project, are fearful of the implications of ex parte contact. They believe by allowing private, closed meetings, even in informal proceedings ex parte circumvents the intent of the Sunshine Act to bring government into the open.

Where Other Sunshine Matters Stand

On the matter of exemptions, Wilhelmina Cooke, an attorney for the public interest Citizens Communications Center, believes certain ones, particularly adjudication, are invoked too often. "I have a feeling a lot of adjudication should be sunshine," she says. "They may have situations dealing with a confidential matter or internal personnel that should be exempt for privacy. But other meetings dealing with forfeiture, which falls under the adjudicatory exemption, should be public."

Of all sunshine-related issues, the one that seems to irritate public interest groups the most is the secretive voting through circulation or notation. Attorney Robner explains notation voting: "They circulate a policy memo. If commissioners agree with the item, they initial it 'yes'; if they disagree, they initial 'no.'" Robner says the practice "enables the FCC to make a decision without a meeting."

Ken Howard says notation voting occurs mostly on routine matters devoid of controversy. Still, he wouldn't say that "nothing substantial ever gets done that way." Recently, this method of policy making was used to merge the Consumer Assistance Office with the Minority Enterprises Division, a move opposed by both offices, according to the CAO's Martha Contee.

One of the most frequently heard criticisms of the Sunshine Act is that it doesn't adequately insure understandable meetings. Commissioners and staff frequently talk in jargon. Ken Howard admits the terminology is a problem. But, he says, "I don't think the FCC would want to take the time to explain the language at each meeting."

Most of the staff and half of the commissioners are lawyers. "Sometimes 'legalese' is a problem for those of us who aren't lawyers," Commissioner Quello says. As a commissioner who opposed the Sunshine Act before its enactment, Quello appears at least lukewarm toward it now. Quello says its main advantage is that it "gives the public the impression they re involved." He says the disadvantages are that it has slowed the decision-making process, led to a situation where representatives and certain commissioners "speak for the sake of speaking" and made meetings "more bland."

The impression conveyed by the FCC is that the public workshops, even more than the open meetings, are the centerpiece to the commission's sunshine actions. Martha Contee of the Consumer Assistance Office says workshops were held in such diverse locales as Boston, Chicago, California, Texas and Florida.

The CAO was established in early 1976 to "coordinate and stimulate information flow between the public and the commission," said the FCC's task force that determined the CAO's character. The workshops became the CAO's most visible public activity. Workshop topics have included radio deregulation, children's television programming and new technologies. CAO staffers attend along with bureau staff and one commissioner. Contee says the workshops afford the public an "opportunity to voice concerns." Contee estimates the average attendance for the past workshops at 150.

Commissioner Quello, who has attended workshops, seems less enthusiastic about them. He says he learned one lesson: "Don't hold workshops in a college town on a Friday afternoon. We went to the University of Miami on a Friday afternoon, and there were 21 people present."

On the whole, Quello believes the "basic idea is good." But, he says, "People want it, raise hell and then don't show up. The agitation is larger than the turnout."

Quello isn't the only one skeptical of the FCC workshops. Some public interest groups express distrust of the commission's motives. Sam Simon, director of the National Citizens Committee for Broadcasting, says, "We weren't happy

about the workshops because they promoted the FCC's own cause." Critics tend to single out the workshop on radio deregulation as particularly objectionable.

Public interest groups are skeptical of FCC motives in other areas as well. They frequently charge that the commission gives industry a more ready ear.

Wilhelmina Cooke insists public interest groups "haven't gotten as good treatment" from the FCC as industry representatives. "To some extent, the commission perceives that public interest groups monkey up the works," she says. "Even in broadcast proceedings, the FCC's general philosophy seems to be to protect industry. There is no kind of facilitation of public concerns on questions of access."

Mark Robner of Common Cause seems less conerned with the industry/FCC relationship. He says the industry regulated by the commission is itself very diverse. The interest of, say, the phone company may conflict with those of broadcasters. Interestingly, Sam Simon of NCCB says he has had little trouble gaining access to commissioners. "We could get in to see anybody," he says. He believes the main drawback to public interest involvement is lack of money. Due to limited resources, "the public interest movement in the media is five people," he says with exaggeration. "CBS has five people typing letters to its lobbyists."

The industry versus public interest question seems to strike a raw nerve in Commissioner Quello. He says frankly, "Industry has billions of dollars invested; public interest groups have nothing. Industry has to answer to its stockholders and the unions." He says he "never fails to see someone from public interest groups." But that doesn't mean he trusts them.

Quello admits that a monetary stake may not be a prerequisite for taking an interest in a proceeding, but he demands to know who the public interest groups really represent. "I'd say, 'You don't represent me, my friends; you can't say you speak in behalf of 100 million consumers,'" he says.

Where Sunshine is Heading at the FCC

With current budget cuts, the FCC is feeling the crunch. The effects are already filtering down to the public.

Bill Russell, director of Public Affairs for the commission, has initiated a number of recent changes. One was the merger of the Minority Enterprises Division with the Consumer Assistance Office. Another was the cutting back on mailings.

Before January 1982, members of the public could obtain copies through the mail of a daily digest of FCC decisions, the **Sunshine Agenda** and **Actions Alert**, which explained FCC rulings. Now, those seeking a notice of an upcoming meeting or an explanation of commission action must wait until the item appears in the **Federal Register** or sign up with an expensive news subscription service.

Unlike before, Contee says, a member of the public couldn't walk into her office at the FCC and say, "Give me a copy of everything you released today." Often a meeting announcement does not make it into the **Federal Register** until the day of the meeting. Notices even have been known to appear in the **Register** after the meeting occurs.

Before January, the CAO produced 1,000 news releases and 350 "texts" of more detail per day. Now, Martha Contee says, the office puts out 200 press releases and 100 texts.

In another reduction, the CAO staff has been cut from 11 to eight. And, Contee says, "We're not doing any traveling now." No upcoming workshops are scheduled.

There is a sad corollary to the cutback situation. Contee says her office hasn't received as many complaints from the public about the cutback in CAO services as she anticipated. "That's a surprise to me," she says.

Conservative leadership and curtailment of the FCC under Reagan present further concern for openness, says Sam Simon of the NCCB. "The real issue is that where the door may have been ajar, even slightly, in the past, it is now closing tight," he says. "The Sunshine Act is more important now than before. Now that there are people who prefer to close it, the act is needed more than ever."

FOOTNOTES

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8. **Federal Register** (3 March 1977): 12173.
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14. John Lang, "The FCC: Washington's Worst Agency?" **U.S. News & World Report** (30 Jan. 1978): 37-40.
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